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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 112

ZEBEDEE HARDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Neither the district court nor the court of appeals rendered an opinion, and the court of appeals has entered no final order. The district court's order denying petitioner leave to appeal *in forma pauperis* and certifying the appeal to be frivolous and not taken in good faith appears in the Appendix, *infra*, p. 33. The court of appeals' interlocutory orders (R. 11, 22) are not reported.

JURISDICTION

The court of appeals' order allowing petitioner to appeal *in forma pauperis* to the extent of requiring that he be furnished a transcript of the government's evidence at the expense of the United States was entered on May 11, 1962 (R. 11). On September 20, 1962, petitioner requested the court to direct that he be furnished a free transcript of the balance of the trial proceedings, or, in the alternative, that he be denied leave to appeal *in forma pauperis* (R. 18-20). On October 24, 1962, the court denied petitioner's request for a full transcript, but took no action with respect to the alternative motion that leave to appeal as an indigent be denied (R. 22). The petition for a writ of certiorari, seeking review of the May 11 and October 24 interlocutory orders, was filed on November 30, 1962, and was granted on April 29, 1963 (R. 24; 373 U.S. 902). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

QUESTION PRESENTED

Whether a defendant who has been denied leave to appeal from a conviction *in forma pauperis* by the trial court, the court certifying the appeal to be frivolous and not taken in good faith, and whose counsel, appointed by the court of appeals to represent him on a motion to that court for leave so to appeal, advises the court that he is unable to suggest any basis for a claim of error after consulting the defendant, the latter's trial lawyer, and the prosecuting attorney, and after examining a transcript of the

government's evidence (furnished him at the court's direction pursuant to his earlier suggestion that the evidence might be insufficient to support the verdict), is entitled to be furnished a transcript of the balance of the trial proceedings at government expense in order that his counsel may search it for unnoticed "plain error" to bring to the court's attention as a basis for appeal.

STATUTE INVOLVED

Section 1915(a) of Title 28 of the United States Code provides:

> § 1915. *Proceedings in forma pauperis.*
>
> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

STATEMENT

On January 15, 1962, following a trial by jury in the United States District Court for the District of Columbia, petitioner was found guilty on both counts of a two-count indictment (Appendix, *infra*, pp. 29-30)

charging him with having purchased, sold, dispensed, and distributed a narcotic drug, heroin, in violation of 26 U.S.C. 4704 (a) (Count 1), and with having facilitated the concealment and sale of the same, knowing it to have been illegally imported, in violation of 21 U.S.C. 174 (Count 2). On February 16, 1962, he was sentenced to concurrent terms of imprisonment of from 20 months to five years on count 1 and five years on Count 2 (Appendix, *infra*, pp. 30-31). On February 19th, petitioner, acting *pro se* (his court-appointed trial counsel, with the approval of the court, having withdrawn his appearance on the same day), applied to the district court for leave to appeal *in forma pauperis*. He alleged in his supporting affidavit that the district court erred (1) "in receiving narcotics into evidence over defendant's objection", (2) "in excluding certain testimony of Sgt. Ellmer [a defense witness] essential to defendant's case", and (3) "in denying defendant's motion for a judgment of acquittal in view of discrepancies in testimony of [a] Government witness which resulted in failure of [the] Government to sustain [its] burden of proof" (Appendix, *infra*, pp. 32-33). The trial court (Holtzoff, D.J.) denied petitioner's application, certifying, in accordance with 28 U.S.C. 1915(a) (*supra*, p. 3), that the appeal was "frivolous and not taken in good faith" (Appendix, *infra*, p. 33).

On March 16, 1962, petitioner filed a *pro se* application to the Court of Appeals for the District of Columbia Circuit for leave to appeal *in forma pauperis*, and requested the appointment of counsel. (R.

1-2). In a supporting affidavit, he assigned seven points as error, as follows (*ibid.*):

1. Judge Holtzoff refuse to here testimony of certain defence witness.
2. Judge Holtzoff made accusation doing testimony of Officer Hutchinson, asserting they are justified in making mistake.
3. Police testified they received a tip, no one testified to confirm their statment.
4. The conflicting testimony of police officer should not have been excepted.
5. In adequate counsel.
6. He did not challenge the indictment sufficient.
7. The indictment was not a true bill.

On March 19, the then Chief Judge of the court of appeals appointed petitioner's present counsel (a different attorney from the lawyer who represented him at the trial) to represent him in connection with the application, and granted counsel thirty days in which to file a supporting memorandum (R. 3).

On April 17, 1962, petitioner's counsel filed in the court of appeals a motion for an order directing that he be furnished a stenographic transcript of the trial proceedings at government expense, and for an extension of thirty days from his receipt of the transcript in which to file the requested memorandum (R. 4-6). The motion alleged: that petitioner "appears to present at least two issues for appeal", *viz.*, that the evidence was insufficient to sustain the conviction, and that evidence was improperly received because it was the product of an illegal arrest (R. 4); that (R.5)

> careful search of the transcript of the motion to suppress evidence made before trial [1], interview of the petitioner, and of both prosecuting and defense trial counsel have failed to reveal any information to support petitioner's claims or any other possible grounds for appeal;

and that, for the latter reason, and "because the claims of error asserted here cannot be disposed of with finality without consideration of the trial proceedings as a whole", counsel "is compelled to seek a transcript of the trial in order to determine whether there is any basis for the petition for leave to appeal" (R. 5). The government's memorandum in opposition to the motion noted the conclusory nature of the claims of error and counsel's failure to explore other possible avenues of substantiating the generalized claims, such as consultation with the trial judge and court reporter (R. 7-8).

On May 11, 1962, the court of appeals entered a *per curiam* order allowing petitioner to proceed *in forma pauperis* "to the extent of having the stenographic transcript of the testimony and evidence presented by the government prepared at the expense of the

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[1] It appears from the district court records that a motion to suppress the use as evidence of the narcotics involved was heard and denied by the court (Matthews, D.J.) on December 15, 1961, and that a transcript of the hearing was furnished petitioner, at his trial counsel's request, for use at the trial. (The evidence adduced at the hearing established that the narcotics were retrieved by the arresting officers from a tree-box on a public sidewalk, into which the officers had seen petitioner discard them a moment prior to his arrest.)

United States", and directing that the time for filing the requested memorandum in support of the petition for leave to appeal without prepayment of costs be extended to thirty days from petitioner's receipt of such transcript (R. 11). *Coppedge* v. *United States*, 369 U.S. 438, decided two weeks previously, was cited as authority for the order.

On May 21, 1962, petitioner filed in the court of appeals a motion for "clarification or rehearing" of the May 11 order (R. 12-14). Arguing that investigation of all possible grounds of appeal "demands nothing less than a transcript containing all the testimony and evidence, all the colloquy, comment, argument and instructions", and that "[s]ince a non-indigent litigant can obtain such a complete transcript to search for error, it cannot be withheld from an indigent litigant", he renewed his request for a transcript of the "entire [trial] proceedings" (R. 13). On July 23, the motion was denied, the order of denial extending until thirty days from that date the time for filing the requested memorandum in support of the application for leave to appeal as an indigent (R. 15).

On September 20, 1962—following a further extension of time (R. 16-17)—counsel filed in the court of appeals a motion for an order directing that petitioner be furnished with a free transcript of the balance of the trial proceedings, or, in the alternative, for an order denying him leave to appeal *in forma pauperis* (R. 18-20). Counsel stated that he had "carefully examined the transcript furnished pursuant to the order of May 11" and that he was "unable to perceive therein any non-frivolous ground for appeal" (R. 18).

He said that he was unable, however, to state to the court that he had conscientiously investigated every possible ground for appeal, since, not having been furnished with a transcript of the testimony and evidence presented by the defense and the judge's instructions to the jury, he could not be sure that "unnoticed plain error" had not occurred at those stages of the proceedings (R. 18, 19). He claimed the right, on petitioner's behalf, to "comb" the entire record in search of some unnoticed error to bring to the court of appeals' attention as a basis for appeal (R. 19).

On October 24, 1962, the court of appeals, one judge dissenting, denied the motion for a transcript of the remander of the trial proceedings, noted the alternative motion that leave to appeal as an indigent be denied, but took no action with respect to it (R. 22). Thus, as we noted in our memorandum in opposition to certiorari (No. 783 Misc., Oct. Term, 1962, pp. 3, 4), and as petitioner, by invoking the "before judgment" jurisdiction of this Court (Pet. Br. 1),[2] acknowledges, the court of appeals has made no final disposition of petitioner's application for leave to appeal *in forma pauperis*.[3]

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[2] Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 2101(e) (authorizing the filing of an application for certiorari to review a case before judgment has been rendered in the court of appeals "at any time before judgment") as well as under 28 U.S.C. 1254(1). (Pet. Br. 1).

[3] We opposed certiorari in this case on the ground, *inter alia*, that petitioner had made no showing that the case met the requirement of Rule 20 of the Rules of this Court, that, to warrant the exercise by this Court of its "before judg-

SUMMARY OF ARGUMENT

I

A. This Court has repeatedly declared, both in federal cases arising under the *in forma pauperis* statute and in State cases arising under the Fourteenth Amendment, that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a non-indigent defendant can purchase such a transcript with his own funds if he chooses to do so. If, as petitioner claims, a would-be appellant *in forma pauperis* is entitled, as of right, notwithstanding a certificate by the trial court that the appeal is not being pursued in good faith, to a complete transcript of his trial in order that his counsel may search it for unnoticed error, then the rule must be that every indigent has precisely what the Court has always insisted he does not have —an unqualified right, on demand, to a complete transcript of his trial at the public's expense.

B. Abstract considerations of equality of treatment of rich and poor alike do not require that an indigent be mechanically supplied a complete transcript at public expense for no other reason than that a non-indigent person can buy such a transcript if he is willing

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ment" jurisdiction, a case must be "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." (Memorandum in Opposition, p. 4). We argue, *infra*, pp. 21-27, that the Court should remand this cause to the court of appeals for further proceedings in accordance with *Ingram* v. *United States*, 315 F. 2d 29, decided by that court subsequent to the last order in this case, while this case was pending in this Court on petition for certiorari.

to make the necessary expenditure. "Absolute equality [of treatment of indigents and non-indigents] is not required; lines can be drawn and we often sustain them." *Douglas* v. *California*, 372 U.S. 353, 357. The fact, for example, that a defendant with funds can secure the services of the best legal assistance within the reach of his purse has never been thought to require that an indigent be permitted to retain, at the expense of the public, any attorney of his choosing. Due process does not require either the States or the federal government to "equalize economic conditions" (*Griffin* v. *Illinois*, 351 U.S. 12, 23 (Frankfurter, J., concurring)) as between poor persons and persons of means.

A rule by which every indigent defendant would be entitled to a complete transcript of his trial in order to look for error, though none was alleged, would be inconsonant with the spirit, if not the letter, of the statutory prohibition against the taking of an appeal *in forma pauperis* where the trial court certifies the appeal not to be taken in good faith. This legislative policy must of course be enforced except insofar as overriding constitutional considerations otherwise dictate. Moreover, because of the "built-in pecuniary brake" upon the incurrence of expenses not deemed reasonably necessary to the successful prosecution of a paid appeal, a rule whereby a complete transcript would be automatically supplied to an indigent in every case would be unsound in principle in that it would place the indigent defendant, in this respect, in a preferred position to that of the appellant who was paying his own costs.

II

This interlocutory proceeding should be remanded to the court of appeals for further proceedings in accordance with that court's subsequent decision in *Ingram* v. *United States*, 315 F. 2d 29. The court there spelled out in detail the kind of information it wished appointed counsel to supply to the court before asking it to order the preparation of an entire transcript at public expense in a case in which the appeal has been certified by the trial judge not to be taken in good faith. This procedure will enable the court of appeals to make an informed judgment as to the necessity for such action in the interest of justice, with due regard for avoiding waste of public funds.

ARGUMENT

I

An Indigent Defendant Whose Appeal Has Been Certified By the Trial Court Not To Be Taken In Good Faith, and Who Makes No Claim of Error, Is Not Entitled To a Complete Transcript of His Trial, To Enable His Counsel To Search It for Unnoticed Error

Petitioner, whose attempt to appeal from his conviction without prepayment of costs has been certified by the trial court to be "frivolous and not taken in good faith" (*supra*, p. 4), has already been furnished, at government expense, a complete transcript of the government's evidence—the only portion of the trial proceedings relevant to the claims of error which

his counsel has suggested[4]—and his counsel has acknowledged that he has been unable to find therein any basis for a claim of error. He now contends that, having been unsuccessful in substantiating the only errors claimed by reference to the portion of the transcript pertinent to that inquiry, he has a right to be furnished, notwithstanding the trial court's certificate, a free transcript of the remainder of the trial proceedings—in order that his counsel may search it for unnoticed and unsuspected "plain error" to bring to the attention of the court of appeals. Otherwise, the argument runs, he will suffer invidious discrimination by reason of his indigence—since a person of means would be able to purchase a transcript of his trial for this purpose (Pet. Br. 6-12).

We submit that the contention is unsound and without support in any of the decisions of this Court. It is, moreover, irreconcilable with the spirit, if not the letter, of the congressional mandate making the trial court's certificate of lack of good faith a bar to the right of appeal as an indigent (28 U.S.C. 1915(a),

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[4] *Viz.*, insufficiency of the evidence to sustain the conviction and the admission of evidence suggested to have been possibly the product of an illegal arrest (*supra*, p. 5). Petitioner's *pro se* allegations of error (*supra*, pp. 4-5)—made before counsel was appointed by the court of appeals to represent him—included one claim to which the portion of the transcript furnished him did not pertain, *viz.*, the assertedly wrongful exclusion of testimony by a defense witness. Counsel, however, following his appointment and investigation of the case (which included consultations with petitioner's trial lawyer and the prosecuting attorney, see *supra*, p. 6), did not renew this claim—having concluded, presumably, that it lacked substance.

supra, p. 3). Althought this Court has held such a certificate not to be "conclusive" of the indigent's right (*Coppedge* v. *United States*, 369 U.S. 438, 446), it has always recognized the certificate to be "entitled to weight" (*ibid.*)—indeed to "great weight" (*Johnson* v. *United States*, 352 U.S. 565, 566). If the sweeping position taken by petitioner were to be sustained, the practical effect, in our view, would be virtually to deprive the certificate of all its authority and significance.[5]

A. *Petitioner's contention is irreconcilable with the repeated statement by this Court that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a defendant with funds can purchase such a transcript*

This Court has repeatedly declared, both in federal cases arising under the statute and in State cases arising under the Fourteenth Amendment, that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a non-indigent defendant can purchase such a

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[5] Petitioner's suggestion that the certificate "can be given weight only on the question of the indigent's good faith in pleading poverty" (Pet. Br. 13) is refuted by the clear language of the statute as well as all the decisions and is manifestly unsound. His further suggestion that "frivolity is negated by the existence of 'plain error', unnoticed below and unclaimed" (Pet. Br. 6) is specious. The trial court's determination that the appeal is frivolous can of necessity relate only to errors claimed. Cf. *Surratt* v. *United States*, 262 F. 2d 691 (C.A.D.C.): "Not knowing what issues, if any, counsel will present, we cannot know whether they will be frivolous" (at 691-692).

transcipt with his own funds if he chooses to do so. *Johnson* v. *United States*, 352 U.S. 565, 566; *Griffin* v. *Illinois*, 351 U.S. 12, 20; *Eskridge* v. *Washington Prison Board*, 357 U.S. 214, 216; *Draper* v. *Washington*, 372 U.S. 487, 495. And see *Farley* v. *United States*, 354 U.S. 521, 522-523; *Coppedge* v. *United States*, 369 U.S. 438, 446. Cf. *Miller* v. *United States*, 317 U.S. 192, 198. Thus, in *Johnson* v. *United States*, *supra*, the Court, while holding that an indigent must be permitted to challenge the certificate by the trial court that the appeal is not taken in good faith, also said (352 U.S. at 566):

> This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. * * *

It is enough, the Court held, that he be assured some appropriate means, such as "the district judge's notes or an agreed statement by trial counsel," of making manifest the basis of his claim that the trial court's certificate is in error (*ibid.*). And see *Coppedge* v. *United States*, *supra*, 369 U.S. at 446, holding that the would-be appellant, in cases so certified, must be supplied with "a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate * * * is in error * * *."*

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* Petitioner's effort (Pet. Br. 13-16) to demonstrate that the *Coppedge* decision is authority for the broad proposition he is urging here—*i.e.*, that every indigent has an automatic right to a complete transcript of his trial, without alleging any error, in order that he or his counsel may search it for error to allege—is refuted by the plain language of the opinion. In the passage containing the language

Similarly, in *Griffin* v. *Illinois*, *supra*, the Court, while holding that an indigent has a right to as adequate appellate review of his state conviction as a defendant who has money enough to buy a transcript of his trial (351 U.S. at 19), stressed that "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it" (351 U.S. at 20)—observing that the State might find "other means of affording adequate and effective appellate review to indigent defendants," such as "bystanders' bills of exceptions" (*ibid.*).[7] And in *Draper* v. *Washington*, *supra*, the

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quoted in the text, *supra*, the Court said (*ibid.*): "* * * if from the face of the papers he [the defendant] has filed, it is apparent that the applicant *will present issues for review* not clearly frivolous, the Court of Appeals should then grant leave to appeal *in forma pauperis*, appoint counsel to represent the appellant and proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals. If, on the other hand, *the claims made or the issues sought to be raised* by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed" (emphasis added). It is clear, in short, that *Coppedge* took it for granted that the application filed by the indigent, concerning which the Court was speaking, raised issues and made claims of error. The Court did not have in mind an application which insisted upon a right to examine the transcript to look for issues to raise.

[7] Opinion of Mr. Justice Black. Cf. Mr. Justice Frankfurter's concurring opinion, 351 U.S. at 24.

Court "reaffirm[ed] the principle [of the *Griffin* case] that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it" (372 U.S. at 495), adding, "the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review" (372 U.S. at 496).

It is evident that if the broad position taken by petitioner and the *amicus curiae* in this case were sound, there would be no place for such decisions. If a would-be appellant *in forma pauperis* is entitled, as of right, notwithstanding a certificate by the trial court that the appeal is not being pursued in good faith, to a complete transcript of his trial in order that his counsel may search it for unnoticed error, then the rule must be that every indigent has precisely what this Court has always insisted he does not have—an unqualified right, on demand, to a complete transcript of his trial at the public's expense. See *Ingram* v. *United States*, 315 F. 2d 29, 31 (C.A.D.C.) (quoted in relevant part *infra*, p. 23, fn. 9). For it obviously cannot be that indigents who, like petitioner, make no claim of error are entitled to free transcripts of their trials to search for error, while indigents who challenge their convictions on specific grounds are entitled to only those portions of their trial records which are pertinent to their claims. If a poor person who is unable to suggest any basis for a claim of error is entitled to a complete transcript in order to search for error, then a poor person who makes specific as-

sertions of error must be entitled to a complete transcript in order to search for other error.[*] Thus, the consequence of sustaining petitioner's claim in this case would necessarily be—as petitioner indeed acknowledges (Pet. Br. 11-12)—that all indigents who manifest the desire to appeal from their convictions have an automatic right to complete transcripts of their trials at the government's expense, without the necessity for making any claim of error whatever, even of the most conclusory sort. The necessity for a particularized showing of need, upon which this Court has always insisted, would be eliminated.

B. *The principle of equal justice for all litigants neither requires nor justifies the rule contended for by petitioner*

The principle of "equality of consideration for all litigants" (*Coppedge* v. *United States*, 369 U.S. 438, 447) neither requires nor justifies reconsideration by this Court of its traditional insistence that complete transcripts of the trial proceedings need not be furnished to indigent appellants at public expense in all circumstances.

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[*] By the same token an indigent whose application for leave to appeal *in forma pauperis* is *granted* would be entitled as of right to a complete transcript—regardless of how unnecessary it might be to review the errors claimed—in order to permit counsel to search it for other errors. Under petitioner's contention, Rule 33(b)(2)(i) of the Rules of the court below ("* * * If the court allows the appeal in forma pauperis, the court shall then also determine at the same time whether, and to what extent, a transcript will be necessary for the proper determination of the appeal. * * *") could not be sustained.

1. It is of course true, as petitioner points out (Br. 6), that a defendant with funds can always secure a complete transcript of his trial if he is willing to make the necessary expenditure. He can do so, moreover, for the specific purpose for which petitioner seeks the transcript of his trial, *i.e.*, to enable his counsel (who may be the same attorney who tried the case, a new attorney, or both) to search it for unnoticed "plain error" to bring to the appellate court's attention—or, indeed, for any purpose. It does not follow, however, that abstract considerations of equality of treatment for all litigants require that an indigent be accorded the same privilege at public expense.

Petitioner's argument to the contrary assumes that an indigent, who seeks to appeal from his conviction at the expense of the government, and an ordinary defendant, who is paying his own appellate costs, are constitutionally entitled to absolute equality of consideration in all respects whatsoever. But this is no more required of the federal government under the Fifth Amendment than it is of the States under the Fourteenth. "[I]t is appropriate to observe," as this Court noted in *Douglas* v. *California*, 372 U.S. 353, 356-357 (with specific reference to indigents and non-indigents),

> that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." [Citing, *inter alia*, *Griffin* v. *Illinois*, *supra*, 351 U.S. at 18.] *Absolute equality is not required; lines can be and are drawn and we often sustain them.* [Emphasis added.]

What petitioner in essence is demanding is the equalization of his economic condition—so far as the ability to procure a complete transcript of his trial is concerned—with that of a person of means. But the federal government, like the States,—

> need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within the reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. * * *

Griffin v. *Illinois*, *supra*, 351 U.S. at 23 (Frankfurter, J., concurring). It has for this reason never been doubted that (*id.* at 24)

> in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. * * *

It is not an unreasonable "hedging about" of an indigent's opportunity to prove his conviction wrong to require that, *where, as here, the trial court has certified the appeal to be frivolous and not taken in good faith,* at least some claim of error be made before any part of the transcript of his trial be furnished him at the public's expense, and to limit the portions furnished to those having relevance to the errors claimed. Where the indigent's counsel, appointed for the purpose by the court of appeals, is unable, after reasonable inquiry, including consultations with his client, the latter's trial attorney, and government counsel, to suggest any basis for a claim of even possible error, it scarcely violates due process canons—

those fundamental principles "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U.S. 319, 325)—for the court to refuse to direct that a complete transcript of the trial be supplied him at government expense so that his counsel may search it for error.

2. This Court, to be sure, is not limited by due process considerations in prescribing rules of procedure for the lower federal courts. In the exercise of its supervisory powers, it may adopt for those courts a rule of practice which, not being imperatively required by the demands of due process, could not be imposed on the courts of the States. Cf. *McNabb* v. *United States*, 318 U.S. 332. A rule, however, by which every indigent defendant would be entitled to a complete transcript of his trial in order to look for error, though none was alleged, would, as we have suggested, seem to be inconsonant with the spirit, if not the letter, of the statutory directive as to the effect of a bad-faith certificate by the trial court. This legislative statement of policy must of course be observed and enforced by the courts except insofar as overriding constitutional considerations require otherwise. Moreover, the rule urged by petitioner would, we believe, be unsound in principle in that it would in fact place the indigent person—so far as the procural of a transcript is concerned—in a more advantageous position than that of the paying appellant. In the case of a paid appeal there is a "built-in pecuniary brake" (*Coppedge* v. *United States*, 369 U.S. 438, 455 (Stewart, J., concurring)) upon the incurrence of expenses not deemed reasonably necessary to the successful

prosecution of the appeal. A paying appellant might well refrain from ordering a complete transcript of his trial on the chance, which he might reasonably regard as disproportionate to the expense entailed, that his appellate counsel will discover reversible error in it which went unnoticed at the trial. Under the rule advocated by petitioner and the *amicus curiae*, on the other hand, an indigent appellant would be subject to no such financial deterrent. He would be, as we have suggested, entitled to a complete transcript on demand, at the public's expense, as a matter of course. Unlike the pecunious defendant, he would be asserting an absolute right to fritter away the public's money—not his own.

II

This Interlocutory Proceeding Should Be Remanded To the Court of Appeals for Further Proceedings In Accordance with That Court's Subsequent Decision In *Ingram* v. *United States*

As noted in the *Statement*, *supra*, p. 8, the court of appeals, in its order of October 24, 1962 (denying petitioner's motion that he be furnished a full free transcript of the trial proceedings), took no action with respect to petitioner's alternative motion that leave to appeal as an indigent be denied. As a consequence, no final order has ever been entered in the case by the court below. If the Court agrees with us that petitioner is not entitled to a full transcript on the basis of the showing so far made, we submit that it would be appropriate to remand this case to the court of appeals for further proceedings in ac-

cordance with that court's subsequent decision in *Ingram* v. *United States*, 315 F. 2d 29, which articulated a procedure which counsel for indigents should follow in situations similar to the instant case.

The *Ingram* case, decided December 6, 1962, six weeks after the last interlocutory order in this case (the order of October 24, 1962, *supra*), was, in all relevant respects, identical. There, an indigent defendant, after unsuccessfully seeking leave from the district court to appeal from his conviction *in forma pauperis*, filed, *pro se*, a similar petition in the court of appeals, in which he complained of his conviction in a "confused and inartful way" (315 F. 2d at 29). The court of appeals, in accordance with its usual practice in such cases, appointed counsel to represent the petitioner, and later a second attorney (at the first one's request). The attorneys did not adopt their client's *pro se* claims of error, but, on the contrary, "seem[ed] to take pains to avoid asserting any error" (315 F. 2d at 30). They "frankly concede[d]" that they were unable to claim error, but said that their inability to do so was due to the fact that they had not been provided with a complete transcript of the trial. They contended that, "having been unable to discover a ground for appeal through the available sources of information, they [were] entitled to a transcript to conduct a search for error as a matter of due process of law" (*ibid.*). Following a denial of their request, counsel moved for reconsideration, contending that the furnishing of a transcript was required by *Coppedge* v. *United States*, 369 U.S. 438.

The court held the *Coppedge* decision to be inapplicable—because of counsel's failure to assert any error whatever (315 F. 2d at 30-31)[*]—but proceeded to consider whether counsel's contention had merit apart from *Coppedge* (at 31-32). The court, noting counsel's argument that, having been unsuccessful in discovering a basis for claiming error as a result of interviews with the principals to the proceedings in the district court, they should be supplied with a complete transcript of the trial, since otherwise there was no effective means for attacking the conviction and "a barrier is thus erected that would not confront a non-indigent defendant in a similar situation," stated that it was "not unsympathetic with this view" (315 F. 2d at 31). The court referred in this connection to an earlier case in which a transcript had been ordered when the attorney for the indigent brought to the court's attention that the defendant's trial attorney had since died, that the prosecutor had resigned from the United States Attorney's Office, and that the trial judge could not be reached—so that "the normal sources [for discovering possible bases for ap-

[*] The court said on this point (315 F. 2d at 31): "If counsel wish to press their motion for transcript under that [*Coppedge*] case they must meet its terms by claiming *some* error. If, on the other hand, they seek a transcript as a matter of due process of law to *search* for some claim of error not suspected or articulated, they must recognize, as we now hold, that the Coppedge case is not applicable. If our position is not correct, then the rule is that a transcript must be furnished to every indigent appellant at Government expense so that he may search for error, even though he has alleged none. The Supreme Court has not yet gone so far." [Emphasis by the court.]

peal] were not available" (*ibid.*). In the pending (*Ingram*) case, on the other hand, the court observed, counsel, although they had set out in their motion what appeared to be a comprehensive investigation of the trial proceedings, had not informed the court in specific terms what they had discovered from the parties interviewed and their examination of the parts of the record which were available to them (*ibid.*). To require the preparation of a complete transcript at government expense without such a detailed showing of need, the court said, would amount to an abdication by the court of its judicial function (315 F. 2d at 31-32). "We are unable to see," said the court (at 32),

> why present counsel cannot, upon the basis of their investigation, advise us as to the circumstances giving rise to the indictment, the theory of the prosecution, the defenses raised by petitioner, the witnesses presented by each party and the pertinence of their testimony, the objections made by defense counsel, and the possible grounds for appeal. * * * Until such steps have been taken by counsel, they have not utilized available remedies or complied with judicial holdings.

The court accordingly denied the motion for reconsideration but without prejudice to its renewal upon a showing in compliance with the opinion.[10]

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[10] Chief Judge Bazelon, dissenting, thought that a transcript was required to be ordered without further proceedings—on the basis of the indigent's conclusory claims of error in his *pro se* petition. He deemed it immaterial that the petitioner's appointed counsel did not adopt any of these claims (315 F. 2d at 33).

Aside from the fact that the petitioner in the *Ingram* case was seeking the entire transcript of his trial, whereas here the petitioner has already received a major part of the transcript and is seeking the remainder, the two cases, it is apparent, are alike. Here, as in *Ingram*, counsel has made no more than a superficial and conclusory report of the results of his investigations to the court below. He has not reported to the court concerning such details as "the circumstances giving rise to the indictment, the theory of the prosecution, the defenses raised by petitioner, the witnesses presented by each party and the pertinence of their testimony, the objections made by defense counsel, and the possible grounds for appeal" (*supra*, p. 24)—information which the court has indicated it wishes to have before being asked to order the preparation of an entire transcript (or, as here, a principal segment of one) at public expense, so that it can make an informed judgment as to the necessity for such action in the interest of justice, with due regard for avoiding waste of public funds. Appellate counsel has merely indicated to the court what persons he has consulted (petitioner, his trial counsel, and the prosecutor, but not, so far as appears, the trial judge, the court reporter, or any witness), and has advised it that his interviews with these persons—together with his reading of the transcript of the proceedings on the pretrial motion to suppress and the portion of the trial proceedings already supplied him (the government's evidence)—have failed to reveal any basis for a claim of error.

The court below concluded in the *Ingram* case, correctly we submit, that it could not "accept such a conclusory representation, for to do so would be to delegate to counsel our judicial function in this regard, without reserving any means by which to check or determine the accuracy of their judgment" (315 F. 2d at 31-32). Unless, therefore, the rule is to be that an indigent has an automatic and unconditional right to a complete transcript of his trial at government expense in every case (to which we have addressed ourselves in Point I, *supra*), we suggest that the proper disposition of this case would be to remand it to the court below to give counsel an opportunity to make to that court the kind of report and showing which the court indicated in the *Ingram* case it desired to have in cases of this sort before being asked to authorize the expenditure of public funds to transcribe an entire trial. Depending on the character of the showing made, the court of appeals might then take any one of a number of courses of action. It might grant in full counsel's request for the balance of the transcript. Or it might grant the motion in part—by directing, for example, that the balance of the proceedings be fully transcribed except for colloquy and argument of counsel; or that some defense testimony be transcribed but that other parts of it be omitted as immaterial; or that the instructions to the jury be transcribed but that the testimony be omitted; etc. Or it might deny the motion *in toto*.[11]

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[11] On remand, the court would of course be free to determine what weight should be given to petitioner's *pro se*

But, whatever the eventual order of the court, it would be one made on the basis of an informed appraisal of all pertinent considerations, and subject to review in this Court on the basis of a record that would present the issues in the context of a detailed development of the relevant facts.[12]

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claims of error, even if appointed counsel fails to adopt them. See the opinion of Chief Judge Bazelon, dissenting, in *Ingram* v. *United States*, *supra*, 315 F.2d at 33. That decision is plainly for the court of appeals in the first instance. Cf. *Scott* v. *United States*, 374 U.S. 502.

[12] Petitioner's (Pet. Br. 9, 10-11, 12-13) and the *amicus curiae*'s (Br. 9-12) reliance on recommendations made by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice is, we submit, misplaced. Although the Committee's Report (1963) at times appears to take the position that a would-be appellant *in forma pauperis* should have an automatic right to a complete transcript of his trial at public expense (see, *e.g.*, pp. 101, 102), it is not clear that the Committee intended to go so far. See, particularly, page 115 of the Report, where the Committee states: "We believe * * * that the solution of the problems of federal *forma pauperis* appeals is, *when necessary*, to provide defendants with transcripts of trial proceedings without preliminary screening * * *" (emphasis added). This statement is hardly consistent with a view that a complete transcript should be furnished as a matter of course. Moreover, the Committee makes clear its view that the ends it suggests should be accomplished by legislation (p. 115). The issue before the Court is, of course, whether there is an automatic right to a complete transcript under present law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the cause should be remanded to the court of appeals for further proceedings.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1963.

APPENDIX

EXCERPTS FROM THE DISTRICT COURT RECORD

1. *Indictment*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on August 31, 1961,
Sworn in on September 5, 1961

THE UNITED STATES OF AMERICA

v.

ZEBEDEE HARDY

Criminal No. 822-'61

Grand Jury No. 1095-61

Violation:

26 U.S.C. 4704 (a), 21 U.S.C. 174 (Possession of Narcotics; Facilitation of Concealment and sale of Narcotics, knowing same to have been imported contrary to law)

The Grand Jury charges:

On or about August 28, 1961, within the District of Columbia, Zebedee Hardy purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, forty-one capsules containing a mixture totaling about 2,270 milligrams of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol.

SECOND COUNT:

On or about August 28, 1961, within the District of Columbia, Zebedee Hardy facilitated the concealment and sale of a narcotic drug, that is, forty-one capsules containing a mixture totaling about 2,270 milligrams of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after said heroin hydrochloride had been imported, with the knowledge of Zebedee Hardy, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

A TRUE BILL:

/s/ Clifford S. (Last name illegible)
Foreman

/s/ David P. Acheson
Attorney of the United States in and for the District of Columbia

(Endorsed "Filed in Open Court Oct. 2, 1961")

2. *Judgment and Commitment*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 822-61

UNITED STATES OF AMERICA

v.

ZEBEDEE HARDY

On this 16th day of February, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Thomas P. Brown

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

> Violation of Title 26, U.S. Code, Section 4704 (a) and violation of Title 21, U.S. Code, Section 174

as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

> Twenty (20) Months to Five (5) Years on count 1; Five (5) Years on count 2; said sentences by the counts of the indictment to run concurrently

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge

(Endorsed "Filed Feb. 19, 1962")

3. *Affidavit in Support of Application for Leave to Appeal in Forma Pauperis*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 822-61

UNITED STATES OF AMERICA

vs.

ZEBEDEE HARDY

AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS

I, ZEBEDEE HARDY, being first duly sworn, depose and say that I am the defendant in the above-entitled case; that in support of my application to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the nature of my (defense, action, appeal) is briefly stated as follows:

1) Trial Judge erred in receiving narcotics into evidence over defendant's objection.

2) Trial Judge erred in excluding certain testimony of Sgt. Ellmer essential to defendant's case.

3) Trial Judge erred in denying defendant's motion for a judgment of acquittal in view of discrepancies in testimony of Government witness which resulted in failure of Government to sustain burden of proof.

I further have truthfully set forth below information relating to my ability to pay the costs of defending the case against me:

* * * *

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Zebedee Hardy

SUBSCRIBED AND SWORN TO before me this 19th day of February, 1962

.....

Notary Public, D.C.

HARRY M. HULL, Clerk

By /s/ Jerry K. Emrich
Deputy Clerk

(Endorsed "Filed Feb. 19, 1962")

Feb. 19, 1962

The application to proceed on appeal without prepayment of costs, and with appointed counsel, is denied. I certify that the appeal is frivolous and not taken in good faith.

/s/ Alexander Holtzoff
District Judge

(Endorsed "Filed Feb. 20, 1962")

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